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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

Office Supreme Court, U.
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JAMES H. McKENNE

C. G. BALLENTYNE AND HONOLULU RAPID TRANSIT AND LAND COMPANY,

Appellants,

vs.

WILLIAM O. SMITH, TRUSTEE; THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, AND C. S. DESKY,

Appellees.

No. 216.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

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HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
1906.

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BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal from an order of the Supreme Court of the Territory of Hawaii, affirming an order of the third judge of the Circuit Court of the First Circuit in the Territory of Hawaii, setting aside a sale of the property of the Pacific Heights Electric Railway Company made by a commissioner under order of Court in a foreclosure suit brought by William O. Smith, as Trustee, against the Pacific Heights Electric Railway Company, Limited, a Hawaiian corporation; August Dreier, Honolulu Rapid Transit and Land Company, Limited, a Hawaiian corporation; Sister Albertina, Trustee, and Charles S. Desky.

The action was brought to foreclose a mortgage of Fifty

Thousand Dollars ($50,000) given by the Pacific Heights Electric Railway Company, Limited, to William O. Smith as Trustee, on the first day of April, 1902, and duly recorded in the Registry of Conveyances in Honolulu, purporting to convey an electric railway two and a half miles in length running up Pacific Heights with the equipment of every kind appertinent to said railroad, and all land and other property conveyed by deed of Charles S. Desky dated January 25th, 1902, (the Deed of Trust is Exhibit "A" attached to the bill of foreclosure). (Tr. pp. 11-21.) Desky's deed is Exhibit "B," (Tr. pp. 21-23). The Trust Deed provided (Tr. p. 17) that on default the Trustee might, in his discretion, sell to the highest bidder all and singular the said railway's property and effects upon proper notice therein provided, and for the completion of said sale to execute and deliver to the purchaser good and sufficient conveyances, which conveyances shall forever bar and foreclose any equity of redemption existing in favor of said Company; it is further provided that any sale whether under the power or by virtue of judicial proceedings shall operate to divest all right, title, interest or estate either in law or equity of said company in and to the property sold, and that the receipt of the Trustee shall be a discharge of the purchaser from any obligation to see to the application of the purchase money or to the authority of the sale.

In the bill is alleged the issue of the bonds of One Thousand Dollars each, that forty were owned by Cecil Brown, Trustee, and ten by F. M. Hatch, the default and demand by the bondholders to foreclose. That the trustee had taken possession of the property and found the railway was not safe for operation; that it would cost the sum of Fifty-five Hundred Dollars to repair; that the company was without any means to repair and the Trustee thereupon brought the present proceeding.

Further allegations show the claims of different parties to property said to be owned by the Company, and also that the title to some of the property transferred had been foreclosed.

The prayer of the petitioner is that the Trustee be directed to sell and apply the proceeds to the bonds, for a deficiency judg-

ment, and that the petitioner be allowed and directed to make deeds upon such sale (Tr. pp. 1-10).

The complaint was filed on the 10th of September, 1904, and on the 31st day of December, 1904, a decree was entered (Tr. pp. 28-35) ordering the sale of all the property and appointing M. T. Simonton, as commissioner, instead of authorizing the Trustee as prayed for in the complaint, and directing the sale to be at public auction after due notice, "said commissioner to make out a full return to this Court for its approval and confirmation within ninety days from the date of this decree." The decree further provides that on making a sale, the commissioner should execute deeds requiring no further order of the Court to let the purchaser into possession. The decree provided that all the other property should be sold first, a steam condenser second, and a cable third, the condenser and cable not to be sold unless all the other property should prove insufficient to pay the sum due (Tr. p. 35). On February 8th, 1905, the commissioner made return (Tr. pp. 36-38) showing that he had duly advertised said sale by advertisement and by posters, and that pursuant to said notice he had sold all of the property excepting the steam condenser first, and the steam condenser second.

"That at such sale C. G. Ballentyne, Esq., became the purchaser of the property first sold as aforesaid, for the sum of $1,100.00.

"That said August Dreier, Esq., became the purchaser of the steam condenser so sold as aforesaid, for the sum of $100.00.

"That the said C. G. Ballentyne, Esq., and the said August Dreier, Esq., were the highest and best bidders respectively, and the respective sums above specified were the highest and best sums bid for the respective property so offered and sold as aforesaid.

"That the undersigned is informed and believes and so states the fact to be that the respective sums bid and the amounts realized at such sale are and each of them is disproportionate to the value of the property so sold as aforesaid.

"Wherefore, your Commissioner submits that said sale should not be confirmed, but that such further order should be made as to the Court may seem meet in the premises."

On the 13th day of February, 1905, William O. Smith, Trustee and Petitioner, protested and objected against the confirmation of both sales and asked for a re-sale. (Tr. pp. 44-45.)

"And the said William O. Smith, Trustee, as aforesaid represents, as the ground for his objection and protest herein, that the highest and best sums bid for the properties, respectively, at said sale in said Commissioner's report mentioned as held on February 4th, 1905, were and are grossly inadequate, insufficient and disproportionate to the real and reasonable values of the properties offered at said sale, respectively, and to the prices which may in fact be had and obtained; and the further ground that a confirmation of said sales made on said 4th day of February, 1905, for the prices then and there offered, respectively, would be unjust and unfair to the Petitioner in this cause and to all the parties hereto.

"And in support of said objections the said William O. Smith, Trustee as aforesaid, prays leave to adduce before this Court, at the hearing of said Commissioner's report and proceedings had in connection therewith, the sworn testimony of witnesses with respect to the real and true values of the property by said decree directed to be sold; said objections being further based upon all the papers, records, and files in said cause, to all of which reference is hereby made and the same made part hereof."

And on the same date the Pacific Heights Railway Company, Limited, by Charles S. Desky, its President, and Charles S. Desky, made a similar motion on the ground:

"That the highest prices bid at said sales for the properties offered, respectively, are altogether disproportionate to the true values of said properties and to the prices which may be obtained upon a re-sale thereof under proper terms and conditions, and are grossly inadequate and unreasonable." (Tr. p. 46.)

The motion also asked that on a re-sale the property be sold in lots and parcels. On the following day, February 14th, 1905, C. G. Ballentyne moved to confirm the sale (Tr. p. 44).

On April 10th, 1905, the third judge of the First Circuit confirmed the sale made to Dreier and set aside the sale made to C. G. Ballentyne, on the ground that the evidence showed as to the latter property that it was worth seven times the amount for which it was sold. The Court arrived at this conclusion by finding the values of the separate parts, there being no evidence

of the actual value of the property as a whole, holding that in the case of a judicial sale the commissioner appointed by the decree was a mere agent of the Court and not a ministerial officer acting in the discharge of a duty imposed upon him by law, and that upon the judicial sale no bidder acquired any interest in the property, and that the confirmation or disaffirmance of a sale is a matter of judicial discretion.

"If it appears to the satisfaction of the Court upon due proof, that the price or sum bid is disproportionate to the value of the property offered for sale to such an extent that upon a re-sale a price or sum greater than the price or sum bid at the original sale—exclusive of the expenses of a new sale—can be obtained it is the duty of the Court to order a re-sale, and a failure on the part of the Court to discharge its duty in this particular, would, on appeal, constitute reversible error." (Tr. p. 49.)

The Court further ordered, as it was the wish of the parties that in the event of re-sale, the property be sold in lots and parcels.

From this order the Honolulu Rapid Transit and Land Company and C. G. Ballentyne appealed to the Supreme Court of Hawaii, (Tr. p. 51,) which Court affirmed the order on the 3rd day of October, 1905. The Court in its opinion (Tr. pp. 52-59) referred to the fact that the property was claimed to have cost $78,000.00, exclusive of the right of way, and was bonded for $50,000.00, recites that the Circuit Judge in affirming the sale and ordering a new sale, had expressed the opinion that a "judicial sale could be set aside in the discretion of the court for mere inadequacy of price and, indeed, that it was the duty of the Court to order a re-sale if it appeared that the price obtained was inadequate to such an extent that upon a re-sale a price could be obtained sufficiently greater to more than cover the expenses of the new sale." (Tr. p. 52.) The Court expresses no opinion on this rule of law, but proceeds to say that the principle question is one of law as to what weight should be given to inadequacy of price when relied on as a ground for setting aside a judicial sale and holds that the rule best sustained by reason and authority is that although mere inadequacy is insufficient unless accompanied by other circumstances, inadequacy so gross

as to shock the conscience or imply unfairness in the sale is sufficient for setting aside the sale before confirmation. If the inadequacy is not gross it should be accompanied by other circumstances. After referring to many authorities to sustain this rule and discussing the case of *Smith v. S. S. City of Columbia,* 11 Hawaii 709, holding that by the language in that case that the inadequacy must be such as to "shock the conscience and to be presumptive evidence of fraud," the Court did not intend as being two different or unconnected things that must unite in order to warrant setting aside the sale.

The Court concludes that no inflexible rule can be laid down in all cases, that more would be required in a judicial sale like the one at bar for the foreclosure of a mortgage than for setting aside a sale where the main object was simply to sell the property for a change of investment. "The main idea is on one hand to maintain the stability of judicial sales and not deter bidders by rendering such sales liable to be set aside for trivial reasons and on the other hand to protect interested parties and not unduly sacrifice their property."

Proceeding the Court says that it is unnecessary to consider whether there were any other circumstances than inadequacy of price in the present case, since although the decision of the trial judge is reviewable, it should not be reversed unless clearly erroneous, and that as considerable weight should be given to the opinion of the trial judge the order should be affirmed.

From this order the appellants have appealed to this Court.

ERRORS ASSIGNED.

Omitting the first and fifth assignment of errors, which are included in the errors herein set forth, the complainants rely upon the following assignment of errors, which clearly set forth the grounds on which the complainants ask that the judgment be reversed.

"(2) That there was error in holding that in this case in which the only objection to the sale was on the ground of gross inadequacy of price, in which no irregularity was charged or proved, and in which it was admitted that there was no actual fraud by Mr. Ballentyne or the Rapid Transit Company in this

sale, or any person bidding thereat, and no evidence of fraud or mistake or other circumstances other than inadequacy of price on which to set aside the sale; to hold that there was a discretion in the Circuit Judge to set aside said sale, and in affirming his decision setting aside said sale, and refusing to confirm the sale to said C. G. Ballentyne.

"(3) That there was error in holding that the fact that the property involved in the sale in this action was worth six or seven times the amount bid was sufficient evidence—with reference to property of a kind and situated as the property herein described is situated—of such gross inadequacy as to authorize the Circuit Judge to set aside the sale.

"(4) That there was error in holding that while the discretion of the Circuit Court Judge had been exercised under an erroneous rule laid down by him, viz: that it was his duty to set aside the sale in case the terms were not the best that could be obtained, and more could be realized upon a re-sale than the amount bid and the cost of a re-sale, that the purchaser only stood in the position of the one making the best offer, which offer the Court could accept or reject in its discretion, yet that the Supreme Court could not interfere with the discretion which had been exercised by the Circuit Judge, under this erroneous view of his discretion." (Tr. p. 61.)

POINTS OF LAW.

The questions which are presented in this case are very simple and clearly raised on the record. They are: (a) Whether there is any discretion in the Circuit Judge to refuse to confirm a sale of property of this kind where there is no evidence of its value, but where there is evidence that if the sale had been made separately six or seven times as much would have been realized, and where no objection is made on any other ground excepting that the price obtained is inadequate and:

(b) Whether it was error for the Supreme Court to sustain the sale on the ground that they would not interfere with the discretion of the Circuit Court when the record shows that that discretion was exercised under an erroneous view of the law, namely, that it was the duty of the Circuit Court to set aside the sale, when more could be realized upon a re-sale than the amount bid and the cost of a re-sale, and that the purchaser only

stood in the position of the one making the best offer, which offer the Court could either accept or reject in its discretion.

We think the mere statement in (b) is sufficient to demand reversal.

I.

THE SALE SHOULD HAVE BEEN CONFIRMED. IT WAS REGULARLY CONDUCTED AND NO FRAUD, UNFAIRNESS OR IRREGULARITY OF ANY KIND IS ALLEGED.

The only ground set forth in the objection is "that the highest and best sum bid for the properties, respectively, at said sale in said commissioner's report mentioned as held on February 4th, 1905, were and are grossly inadequate, insufficient and disproportionate to the real and reasonable values of the properties offered at the said sale, respectively, and to the prices which may be had and obtained; and the further ground that a confirmation of said sales made on said 4th of February, 1905, for the price then and there offered, respectively, would be unjust and unfair to the petitioner in this cause and to all the parties hereto." (Tr. p. 45.)

The only ground alleged is that the price is disproportionate to the real value and to prices which might be obtained. The unfairness alleged is unfairness on this ground, not any unfairness in the proceeding. And the Trustee offers to produce at the hearing simply "witnesses as to the real and true value of the property" while the defendant asks a re-sale simply to have the property sold in separate parts and parcels.

The single question presented under this head is whether inadequacy of price uncoupled with any irregularity and by any circumstances indicating either fraud or unfairness, where it is not claimed that the inadequacy of price is evidence of fraud or unfairness, will authorize the Court to set aside the sale.

Before the decision in this case by the Court below the point had been settled in Hawaii in a very similar case cited and approved by the Court in its opinion, in which although the Court found that the cost of repairing, would be greater than

the value of the vessel repaired (which is the case of this railroad), it declined to consider it as a wrecking proposition, which is a pure matter of conjunction (which is this case) and after holding that the purpose of confirmation was to determine whether the sale was "fairly and properly conducted." The Court affirmed the rule:

"There is but little doubt that the general rule governing the confirmation of a judicial sale is that the sale, if regular will be confirmed unless the price obtained is so grossly inadequate to the value of the property sold as to shock the conscience of the court, and be presumptive evidence of fraud."

Smith v. City of Columbia, 11 Haw. 709.

Nor is this rule disavowed by the Hawaiian court in the present case. It says in discussing the citation above quoted:

"It is true the Court used the expressions 'shock the conscience' and 'be presumptive evidence of fraud' in the conjunctive, although similar expressions when coupled in other cases and in the text books are generally stated in the disjunctive, and yet it is clear that the court did not intend these as being two different or unconnected things which must unite in order to warrant setting aside a sale. Not only is the word 'fraud' used in expressions of this kind in a general sense as including surprise, accident, mistake, irregularity, etc., as well as fraud, misrepresentation, misconduct, etc., but it is the grossness of the inadequacy which implies the fraud or unfairness, and it is sufficient if the inadequacy is so great as to imply that, even though it does not suggest the nature of the fraud and there is nothing else to show in what it consisted. As stated in one of the quotations above made, it is sufficient if the grossness of the inadequacy is such as to afford substantial evidence that for some perhaps unknown reason the property has been greatly undersold." (Tr. p. 57.)

In other words, the grossness of the inadequacy must imply fraud or unfairness even though it does not suggest the nature of the fraud, but here the cause alleged is that the property as it turns out would have brought more if sold in parcels, which shows a mere error of judgment.

In a leading case upon this subject Mr. Justice Bradley said, after citing Lord Eldon's opinion, that the practice of opening biddings upon the mere offer of an advanced price tended to diminish confidence in the sale, to keep bidders from attending

and to diminish the amount realized, and calling attention to the fact the Lord Eldon's views had been adopted in England by act of Parliament and in this country by a long line of authorities, which are cited, continues:

"From the cases here cited we may draw the general conclusion that if the inadequacy of price is so gross as to shock the conscience, or if in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property, or party interested in it, has been for any other reason, misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud."

Graffam v. Burgess, 117 U. S. 180: 29 L. ed. 839.

After calling particular attention to four cases, in one where the sale took place on a stormy day and no one was present but the purchaser and the sheriff, in another the owner was ignorant, stupid and preverse and misunderstood the circumstances of the sale; in another in this Court where 14,000 acres of land worth from $40,000 to $70,000 were sold to the attorney for the plaintiff for $9.13½ in which the Court found that the purchaser had shown conduct of an irregular and extraordinary character which in connection with the gross inadequacy of consideration irresistably compelled the conclusion that the sale and purchase of the land were a malicious design on his part to deprive the owner of his property. *(Byers v. Surget*, 19 Howard 303: 15 L. ed. 670.) And a Massachusetts case in which in addition to the inadequacy it appeared that the mortgagee in making the sale had acted in bad faith to the mortgagor, the Court continued:

"Mr. Kerr, in his Treatise on Fraud and Mistake, says: 'Inadequacy of consideration, if it be of so gross a nature as to amount in itself to conclusive and decisive evidence of fraud, is a ground for cancelling the transaction.' Kerr Fraud, Am. ed. 186. Chancellor Desaussure, in the case of *Butler v. Haskell*, 4 Des. 651, 697, on the same subject says: 'I consider the result of the great body of the cases to be, that wherever the Court preceives that a sale of property has been made at a grossly inade-

quate price, such as would shock a correct mind, this inadequacy furnishes a strong and in general a conclusive presumption, though there is no direct proof of fraud, that an undue advantage has been taken of the ignorance, the weakness, or the distress and necessity of the vendor; and this imposes on the purchaser a necessity to remove this violent presumption by the clearest evidence of the fairness of his conduct.' "

Graffam v. Burgess, ubi supra.

In this case Justices Miller, Wood, Mathews and Gray dissented on the ground that it would lead to evil results by discrediting judicial sales, chiefly on the ground that the action to set aside the sale was brought after the period of redemption was passed, although the Court found that a part of the scheme was to keep the judgment debtor ignorant of the sale and that she was unconscious of her position.

We strenuously insist that this case when examined is only authority to the point that gross inadequacy of price coupled with other circumstances indicating unfair practices is evidence of fraud. The case was decided largely on the authority of the earlier case in which the court said:

"To meet the objection of the sale in this case, founded on the inadequacy of the price at which the land was sold, it is insisted that inadequacy of consideration, singly, cannot amount to proof of fraud. This position, however, is scarcely reconcilable with the qualifications annexed to it by the courts, namely, unless such inadequacy be so gross as to shock the conscience: for this qualification implies necessarily the affirmation that if the inadequacy be of a nature so gross as to shock the conscience, it will amount to proof of fraud."

Byers v. Surget, ubi supra.

Byers v. Surget and *Graffam v. Burgess* are reviewed by Mr. Justice Brown in a more recent case recognizing the rule that other circumstances than mere inadequacy of price are generally necessary, who says:

"While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction, as a case for vacating it, especially if the inadequacy be so gross as to shock the conscience. If the sale has been attended by any irregularity, and if several

lots have been sold in a bulk where they should have been sold separately, or sold in a manner that their full value could be recognized: if the bidders had been kept away: if any undue advantage has been taken to the prejudice of the owner of the property, or if he has been lulled into false security: or if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price—the sale may be set aside, and the owner may be permitted to redeem."

Schroder v. Young, 161 U. S. 334: 40 L. ed. 721.

Many cases cited in the notes to this case in the Lawyers' Edition sustain the proposition that gross inadequacy of itself is not sufficient.

It will be observed that none of the circumstances suggested by Mr. Justice Brown are involved in this case. To sustain the judgment of the court mere inadequacy of price alone must furnish the ground.

Nearly all the cases are reviewed by Mr. Freeman in his work on Executions, in discussing the conclusions of the Supreme Court of the United States in the case of *Graffam v. Burgess*, 117 U. S. 192, he says:

"From the conclusion thus announced, that when there is a great inadequacy of price, confirmation will be refused in any circumstances of irregularity or unfairness shown to have preceded or attended the sale, there is no dissent. To say, however, that such refusal must be justified, 'if the inadequacy is so gross as to shock the conscience,' is, in effect, to affirm that inadequacy may, in every instance, be a sufficient ground for refusing a confirmation, if it shock the conscience of the judge to whose consideration it is presented. We think the decided weight of authority in the United States does not sustain this conclusion, and that, on the contrary, it asserts that where there is no irregularity or unfairness, or in other words, nothing but inadequacy, urged as a ground for refusing confirmation, it must fail, though the inadequacy be very clearly established and be so great that it may be characterized as gross."

Freeman on Executions, section 304i.

We respectfully urge that the rule announced by Mr. Freeman is the correct rule; that mere inadequacy of price is not sufficient to set the sale aside, for to say that if it is so gross as to

shock the conscience is to leave it to the conscience of each chancellor or in other words to the idea of each individual judge of what is gross and what should or does shock his conscience. It is incredible that so important a question as whether stability shall be given to a judicial sale should be left to a rule which would vary with every individual judge.

Nor is mere inadequacy apart from the circumstances of the case of itself, however gross it may be, evidence of irregularity or unfairness. It is only in connection with the circumstances of the case which of themselves might not be sufficient to evidence fraud, irregularity or unfairness that the Court may, because of the grossness of the inequality, infer fraud, irregularity or unfairness.

In the present case, however, there is no allegation or contention that there was fraud, irregularity or unfairness, or that the inadequacy evidenced any of these. The only ground on which the sale is sought to be set aside is, and the Circuit Judge with perfect frankness announced the only rule on which this judgment can be sustained as:

"If it appears to the satisfaction of the Court, upon due proof, that the price or sum bid is disproportunate to the value of the property offered for sale to such an extent that upon a re-sale a price or sum greater than the price or sum bid at the original sale—exclusive of the expenses of a new sale—can be obtained, it is the duty of the Court to order a re-sale, and a failure of the Court to discharge its duty in this particular would, on appeal, constitute reversible error. It is the duty of a Court of equity, in all cases before it, and especially in a suit to enforce and foreclose a lien upon specific property to see to it that the rights and interests of all parties in interest are conserved and protected, and it would be unconscionable to adopt an arbitrary rule for the guidance of a court of good conscience and of equal, exact and substantial justice, which would tie its hands and defeat the chief purpose of its creation and existence.

"I am satisfied, in the case at bar, that the price or sum bid at the commissioner's sale for the property first described in the decree, is grossly inadequate and disproportionate to the value of the property offered for sale and that an amount vastly in excess of the price or sum bid, exclusive of the expenses of a new sale, can be obtained on a re-sale thereof. As it is the wish

of the parties, expressed in open Court, that in the event of a re-sale of the property first described in the decree, that the same should be sold in lots and parcels and not as a whole, and as the evidence tends to show that a greater price could be obtained for said property if sold in lots and parcels, in my judgment it would be for the best interests of all parties concerned that upon a re-sale said property should be sold in lots and parcels and not as a whole." (Tr. pp. 49-50.)

In other words, this case must stand or fall upon the simple proposition that where property which was sold as a whole would, in the opinion of the Court, bring six or seven times as much if it were sold in parcels, the sale as a whole should be set aside, although there was no fraud, irregularity or unfairness in the sale itself, because a mistake in judgment had been made in which all parties but the purchasers participated.

We will at the risk of burdening the Court cite a large number of cases in which the fundamental proposition for which we contend is laid down and applied. We shall not only deal with judicial sales pure and simple but with those cases which arise under sales on execution and other similar sales where the rule has been applied, because an examination of authorities will show, as was the case in *Graffam v. Burgess, ubi supra*, that no radical distinction is made in applying the rules, this is recognized by the Court of Hawaii in its opinion and our contention in effect maintained, the Court holding that the main object is to maintain the stability of the sale and not to deter bidders, but holding what is undoubtedly true, that more might be required after confirmation than before, or in the case of an execution sale where there was a right of redemption, after that right had expired, then a case like the case at bar. But the question involved in the proposition we are now discussing is not the amount or weight of the evidence but whether under the rules of law the sale can be set aside at all for mere inadequacy of price. To this the rule announced in one class as well as in another is equally applicable.

While it may not be in strict logical order we shall take up these cases under an artificial division showing that the consciences of judges have not been shocked by prices of similar or

even much greater inadequacy; that the rule has been applied in numerous cases where, as in this case, the question arose directly on the confirmation of a judicial sale, and finally citing the larger number in which in sales of similar character whether on execution or otherwise and whether the question has arisen on a bill in equity to set aside or upon some motion, the principle has been laid down, and from these we shall finally conclude that the true rule after all is that there must be some equitable reason outside of mere inadequacy to set aside the sale, and that if the inadequacy alone can be taken as sufficient evidence of fraud, unfairness or irregularity, it can only be in cases where the amount realized from the sale is nominal and where the purchaser is getting something for nothing which is not this case.

(a) Cases in which the conscience of the chancellor has not been shocked by similar or even greater disparity than in the case at bar.

An equity worth $2400.00 sold for $5.00, sale will not be set aside on the ground of inadequacy of price.

Kerr v. Haverstick, 94 Ind. 178.

Also where property worth $600.00 for $165.00.

Sowles v. Harvey, 20 Ind. 217, 83 Am. Dec. 315.

We cite also an Indiana case in which the price was about one twenty-fourth part of the full value of the lot, in which the court said:

"The rule that a sale will be set aside for gross inadequacy of price, applies only to private sales and not the sales at public auction, Freem. 441. So in *Livingston v. Byrne,* the Court of Errors held unanimously that inadequacy of price was not sufficient to invalidate a judicial sale, unless there be additional circumstances to justify it. And that decision is placed on the authority of Lord Elden in *White v. Damon,* 7 Ves. Jr. 30-34. See also accordingly 3—Hay 1 Speer Chan, 361—2 Green's Chan. 460.

"The rule to be deduced from these authorities as applicable to this case, is, that gross inadequacy of price is not sufficient of itself, to set aside a judicial sale like that to Benton, but

that such inadequacy may be a controlling element in connection with other circumstances."

Benton v. Schreeve, 4 Ind. 69.

Where land worth from $2500.00 to $2800.00, with an incumbrance of $1500.00, was sold under execution for $25.00, the inadequacy of price is insufficient ground on which to base a decree, setting the sale aside as fraudulent.

Hullerton v. Seiper, 34 Atl. 680 (N. J. Eq.).

A bid of $100.00 at a fair public sale, for property worth $1500.00, but upon which there were liens, amounting to $800.00, there being no pretense of fraud, held not to be so grossly inadequate as to set aside the deed.

Weber v. Weitling, 18 N. J. Eq. 441.

Gross inadequacy of price in the absence of fraud, mistakes, illegality, or surprise, is not sufficient to set aside a sheriff's sale and conveyance under an execution at law.

The property was struck off for $25.00, and was sold immediately afterwards for $1500.00. Bill to set aside the sale dismissed.

Smith v. Duncan, 16 N. J. Eq. 240.

Thus where a sale of property worth forty to fifty thousand dollars was sold for $250.00, it was set aside not on the ground of inadequacy of price, but because the description of the property was imperfect and the parties were misled in respect to the sale, and the purchaser was attorney for the plaintiff and not an innocent purchaser.

Rogers Company v. Cleveland Company, (sale affirmed in Department, 32 S. W. 1, 34 S. W. 57), 132 Mo. 442, 53 Am. St. Rep. 494.

Where property of the value of $55,000.00 was sold for $13,100.00, the court says:

"There is no merit in the contention of plaintiffs that the sale of the property should be set aside upon the ground of inadequacy of price. It is a well established rule in equity that mere inadequacy of price, in the absence of other considerations, is no ground for setting a sale aside, unless it be so great and unconsceivable as to shock the moral sense.

"Bispham in Principles of Equity, sixth edition, section 219, says:

"Originally inadequacy of consideration will not be sufficient to set a bargain sale aside, or to justify a refusal to enforce its specific performance. Where, however, the inadequacy is so great as to 'shock the conscience' (which is the phrase usually employed) contracts may be rescinded. * * * A case, therefore, of fraud from inadequacy of consideration, pure and simple, and unmixed with any other kind of fraud, is of very rare occurrence. Nevertheless the rule must be considered as well settled, although rather by dicta than by decisions, that a transaction will be set aside if there is 'an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it.' The relief, however, in such cases is granted (it is said) not on the ground of inadequacy of consideration, but on the ground of fraud as evidenced thereby. *Holmes v. Fresh*, 9 Mo. 201. The doctrine thus announced is the well-settled law of this state."

McDonnell v. De Soto Sav., Etc., Assn., 175 Mo. 250, 75 S. W. 438: 97 Am. St. Rep. 592.

Petition to have sale of property for $185.00 set aside because property was worth $12,000, held not to state a cause of action.

See *Kearney v. Boeckeler*, 143 Mo. 60, 44 S. W. 721.

In Texas where land worth $3000 to $6000 sold for $10 it is said:

"The price must be utterly insignificant and shockingly disportionate to the value of the property so that the court cannot regard it in conscience as any consideration whatever, and the mere fact of attempting to hold the property is conclusive evidence of fraud."

Weaver v. Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792.

Smith v. Perkins, 81 Tex. 152, 26 Am. St. Rep. 794.

At a sheriff's sale upon an execution for costs against a plaintiff in a suit to recover a tract of land, the land in controversy was sold for $55.00, it was worth $1200.00. In a suit to set aside the sale held:

"That the inadequacy of price alone was not ground to avoid the sale."

Jones v. Pratt, 77 Texas 210, 13 S. W. 887.

In a case where property worth from $400.00 to $2000.00 sold for $61.00:

"Mere irregularity in making a judicial sale, when taken in connection with gross inadequacy of consideration, will not alone, as matter of law, be held a sufficient ground for vacating such a sale, in the absence of facts showing that the irregularity conduced to the inadequacy of the sum bid."

Allen v. Pierson, 60 Texas 604.

Reversionary interest in estate worth $800.00 sold for $3.05 held mere inadequacy of price not sufficient to invalidate a sale where no trust relation exists.

Mason v. Jackson (Tenn.) 1900, 57 S. W. 217.

Under the Georgia Code, §2647 and §2742, held, where property worth $25,000, if sold separately, sold for $5250 en masse.

Inadequacy of price, though gross, will not be sufficient to set aside a sale unless coupled with other circumstances sufficient to give rise to a presumption of fraud.

Palmour v. Roper et al., 119 Ga. 10: 45 S. E. 790.

A sale of property worth $3500.00 for $384.70, will not be set aside.

Wall v. McGalliard, 67 Ill. 519.

So where property was sold for $14.59 an acre, estimated by witnesses at the value from $20.00 to $125.00 per acre, an order setting aside the sale was reversed.

Ganst v. Moss, 20 Ill. 549.

So land worth $50.00 an acre sold for $15.00.

Comstock v. Purple, 49 Ill. 159.

In Iowa in spite of the decision hereafter referred to, in reference to confirmation, authorizing the court to set aside a sale where a larger price can be realized the conscience of the court has not been shocked in case where execution sales have been sought to set aside for great disparity.

Where property worth $2500.00 was sold for $169.20 it will not be set aside for inadequacy; for it is well settled that mere inadequacy, where no fraud in the sale has been shown, is not sufficient.

Griffith v. Milwaukee Harvester Co., 92 Ia. 632, 61 N. W. 243, 54 Am. St. Rep. 572.

So where property worth more than $2000 was sold for $36.75 it was held that although the price was nominal the sale could not be set aside for inadequacy.

Sheppard v. Messenger, 107 Ia. 717: 77 N. W. 515.

Where land is shown to be worth $400.00 and is sold for $60.00, subject to a mortgage of $100.00 and accrued interest, the price is not so inadequate as to justify the court in setting aside the sale.

Wood v. Young, 38 Iowa 102.

Land valued at $1600.00 sold for $261.00 and sale held not invalid of the ground of gross inadequacy.

Wallace v. Berger, 25 Iowa 456.

Thus where property was sold for $1500.00 subject to a mortgage which left $700.00 of value and the bid was $55.25 the Supreme Court reversed the court below in setting aside the sale holding that gross inadequacy of price not sufficient to avoid a judicial sale.

Peterson v. Little, 74 Ia. 223, 37 N. W. 169.

Where property worth $2500.00 was sold for $400.00 the court will not set it aside for mere inadequacy of price. If set aside the appellate court could reverse it as an abuse of discretion.

Stroup v. Raymond, 183 Pa. St. 279, 36 Atl. 626, 63 Am. St. Rep. 758.

So where a saw-mill and fixtures worth between four and five thousand dollars were sold for $50.00, it was held that to set aside the purchaser must be responsible for the inadequacy and the sale was confirmed.

Carden v. Lane, 48 Ark. 216, 2 S. W. 709.

So where property valued at $534,546.21 was sold for $57,700.00, the court refused to set aside the sale and confirmed it, citing—2 Beach Mod. Eq. Pr., sec. 821: "To justify the interference of the court, there must be fraud, mistake, or some accident by which the rights of the parties have been affected. It has never been decided that mere inadequacy of price was a sufficient reason, of itself, to open a sale. Id. sec. 824."

Fidelity, Etc., Co. v. Roanoke Iron Co., 84 Fed. 752.

This case was followed by one where property which cost $2,000,000 was sold for $160.00.

Magann v. Segal, 92 Fed. 252.

"The old chancery rule has been abolished in England and never existed in this country."

In this case the court refused to set aside a sale of collateral for $25.00 where it turned out that it was worth $3200.00 on the ground of inadequacy of price, justifying this partly on the ground that the $3200.00 was to be realized in the future, and that under all the circumstances it was not such as to come within the rule authorizing it aside while it shocked the conscience of the court.

Files v. Brown, 124 Fed. 133.

(b) Cases in which the rule has been applied directly to the confirmation of judicial sales.

Thus, although there are cases which hold, as is suggested by the Court of Hawaii, that a less rigid rule would be applied where the proceeding is one merely to change the character of the investment or to convert real property into personal property, yet even in these cases it has been held that in a partition proceeding that "as a rule something more than mere inadequacy of price must appear before a sale can be set aside unless the inadequacy be so great as to shock the conscience."

Dazet v. Landry, 22 Nev. 261; 38 Pac. 264.

So in Illinois:

"Where on a sale of lands made by the master in chancery, under a decree in partition, the order of the court directing such sale, was in every particular faithfully complied with, and all the proceedings were conducted with the utmost fairness, such sale will not be disturbed, even though the lands were worth one hundred per cent. more than the sum actually bid for them, and for which they were sold."

Comstock v. Purple, ubi supra.

Master having made a partition sale and "on the coming in of the master's report, exceptions were taken, and a motion was made to set aside the sale."

"Judicial sales will not be disturbed for mere inadequacy of price, unless the price obtained is so grossly inadequate as to amount to fraud."

Duncan v. Sanders, 50 Ill. 475.

Also in Maryland on exceptions to ratification of sale of trust lands:

"A sale of trust land being fair and regular, it will not be set aside because the purchase price is somewhat less than the value of the land."

Thompson v. Ritchre, 80 Md. 270; 30 Atl. 708.

And so in Arkansas it has been held that an inadequate price is not sufficient to entitle defendant to a re-sale.

Nix v. Drangan, 56 Ark. 240; 19 S. W. 669.

In Kentucky on appeal from the confirmation of a sale on execution mere inadequacy, in this case not large, was held not sufficient.

Robb v. Hannah's Executor (Ky. 1890), 14 S. W. 360.

And in a case where on a judicial sale the property was worth more than three times what it was sold for the Court said nevertheless:

"Unless there was injustice or wrong done to the owner and debtor (who was a married woman) by reason of mistake or misconduct of the Commissioner as alleged by her the sale must stand."

Passmore v. Moore (Ky. 1893), 22 S. W. 325.

To like effect:

Alms & Doepke Co. v. Gates, (Ky. 1895) 32 S. W. 1088.
Ison v. Kinnaird, (Ky. 1891) 17 S. W. 633.
Terry v. Swinford, (Ky. 1897) 41 S. W. 553.
Owens v. Owens, (Ky. 1899) 52 S. W. 822.

So in Pennsylvania in numerous cases on confirmation:

Stroup v. Raymond, ubi supra.
Hollister v. Vanderlin, 165 Pa. St. 248, 30 Atl. 1002.
Cake v. Cake, 156 Pa. St. 47, 26 Atl. 781.
Felton v. Felton, 175 Pa. St. 44, 34 Atl. 312.

So in a case where the property was sold in gross for one-third of its value, and it was sought to set aside the sale and sell in parcels, the South Dakota Court said:

"The inadequacy of price is also complained of as another cause why the sale should be set aside. Inadequacy is not such an irregularity as will warrant a judicial or execution sale to be set aside, unless accompanied by other facts showing, or tending to show, that such inadequate price was brought about by other acts or irregularities that were unlawful, or resulting from mistake, accident, surprise, misconduct or fraud."

First Nat. Bank of Deadwood v. Black Hill Fair Assn., 2 S. Dakota, 145, 48 N. W. 852.

In Alabama where the sale was for $305.00 and the land worth $900 with tax incumbrances of $243, it was held the sale would not be set aside for inadequacy.

Glennon v. Mittenight, 86 Ala. 455, 5 So. 772.

In an earlier case in a chancery sale, it is said:

"Where a stranger purchases at mortgage sale, it will not be set aside for mere inadequacy of price, however gross, unless there be some unfairness at the sale, or the parties interested are surprised, without fault or negligence on their part."

Littell v. Zuntz, 2 Ala. 256, 36 Am. Dec. 415.

"Ordinarily inadequacy of price paid is not alone sufficient cause for setting aside a judicial sale, particularly of personal property of fluctuating value."

Conway v. John, 14 Colo. 30, 23 Pac. 170.

Where the Court refused to confirm a sheriff's sale it was held:

"Inadequacy of price, taken alone, is seldom, if ever sufficient to authorize the setting aside of a sheriff's sale."

Means v. Rosevear, 42 Kans. 377, 22 Pac. 319.

McGeorge v. Lease, 37 Kan. 387, 4 Pac. 846.

"Mere inadequacy in the price bid at a fairly and regularly conducted sale" (made pursuant to the order of the chancellor) "will not justify refusal to confirm the sale."

Bethleham Iron Co. v. Philadelphia & S. S. Ry. Co., 49 N. J. Eq. 356, 23 Atl. 1077.

"The practice of the English chancery, of opening biddings at the master's sales, has not been adopted here."

Williamson v. Dale, 3 John, Ch. (N. Y.) 290.

"Mere inadequacy of price is not sufficient ground for setting aside a sale, unless the inadequacy be so gross and palpable as, of itself, to afford evidence of actual fraud."

Osgood v. Franklin, 2 John. Ch. (N. Y.) 123.

The rule that the Court will not set aside for mere inadequacy of price unless so great as to shock the conscience, has been announced in a number of cases without indicating what inadequacy will shock the conscience.

Pewabic Mining Co. v. Mason, 145 U. S. 349, 36 L. ed. 732.

Magann v. Segal, ubi supra.

Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co., 54 Fed. 26.

Fidelity Insurance Trust Co. v. Roanoke St. Ry. Co., 98 Fed. 475.

(c) Cases not already cited and not cases of the confirmation of a judicial sale which affirm the principle that mere inadequacy of price is not sufficient.

In addition to the cases already cited under (a) and the cases of confirmation of sale, we cite the following cases where the principle is recognized.

Thus mere inadequacy of price is not sufficient:

Homerfeldt v. Zellers, 7 N. J. L. 156.
Lennon v. Heindel, 56 N. J. E. 8, 37 Atl. 149.
Morrisse v. Inglis, 19 Atl. 16, 46 N. J. E. 306.
Mercereau v. Prest, 3 N. J. E. 460.
Bank of New Brunswick v. Hassert, 1 N. J. E. 1.
Simmons v. Vandergrift, 1 N. J. E. 55.
Quigley v. Breckinbridge, 180 Ill. 627, 52 N. E. 580.
Barling v. Peters, 134 Ill. 606, 25 N. E. 765.
Pickering v. Griggers, 59 Ill. 65.
Gibbons v. Bressler, 61 Ill. 110.
McMullen v. Gable, 47 Ill. 67.
Noyes v. Grue, 23 Ill. 450.
Ackerman v. Hendricks, 117 Iowa,, 106, 90 N. W. 522.
Herden v. Trustees College Bible, (Ky. 1898) 20 Ky. Law. Rep. 30, 45 S. W. 67.
Parker v. Hannibal, 44 Mo. 415.
Meir v. Zelle, 31 Mo. 331.
Choutean v. Nickolls, 20 Mo. 442.

Media Title & Trust Co. v. Kelly, 185 Pa. St. 131, 39 Atl. 832.

Mead v. Munroe, 113 Pa. St. 220, 8 Atl. 374.

Cooper v. Wilson, 96 Pa. St. 409.

Cooper v. Galbraith, 6 Fed. Cases, 3193.

Cowles v. Phœnix Mut. Life Insur. Co., 63 Kan. 883, 65 Pac. 217.

Bocher v. Louisville, 76 S. W. 18, 25 Ky. L. Rep. 492.

Konic v. Hill, 127 Cal. 162, 59 Pac. 832.

Anglo-Californian Bank v. Cerf, 142 Cal. 303, 75 Pac. 902.

Summerville v. March, 142 Cal. 554, 76 Pac. 389: 100 Am. St. Rep. 145 and note.

Koch v. West, 118 Iowa 468, 92 N. W. 663, 96 Am. St. Rep. 394.

Even gross inadequacy is not of itself sufficient.

Cavender v. Smith, 1 Iowa 306.

It must be coupled with other circumstances sufficient to give rise to the presumption of fraud or unfairness.

Palmour v. Roper, ubi supra.

Smith v. Huntoon, 134 Ill. 24, 24 N. E. 971, 23 Am. St. Rep. 646.

Dobbins v. Wilson, 107 Ill. 17.

The inadequacy must amount to evidence of fraud.

Quigley v. Breckinridge, ubi supra.

Barling v. Peters, ubi supra.

Duncan v. Sanders, ubi supra.

It is a mere fact admissable as evidence to establish fraud.

Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475.

Central Pac. R. R. Co. v. Creed, 70 Cal. 497.

It cannot effect the purchaser's right where he has no notice of a fraud or irregularity, even when it is held that the court has a large discretion in these cases.

Williams v. Johnson, 112 N. C. 424, 17 S. E. 496, 34 Am. St. Rep. 513.

II.

THE DISCRETION TO SET ASIDE A JUDICIAL SALE IS A LEGAL DISCRETION AND NOT AN ARBITRARY ONE, AND IS TO BE EXERCISED UNDER THE RULES OF LAW AND THE EXERCISE OF THIS DISCRETION UNDER AN ERRONEOUS RULE OF LAW IS CLEAR ERROR.

The Supreme Court of Hawaii affirmed the order of the Court below on the ground that while there was an appeal from the exercise of the discretion of the trial judge, "that they should not be reversed except where they are clearly erroneous. Considerable weight should be given to the opinion of the trial judge in a matter of this kind. Under the circumstances we are of the opinion that the order appealed from should not be reversed and accordingly it is affirmed." (Tr. p. 59.)

In other words, the order was affirmed not in the exercise of the discretion of the Supreme Court, but in affirmance of the discretion of the judge of the Circuit Court. His discretion, however, was clearly exercised under an erroneous view of the law. He found that there was no evidence of the actual value of the property as a whole (the manner in which it was advertised and offered for sale), but that there was evidence that if sold separately it would bring at least seven times the value (Tr. p. 48) and then says:

"Under a judicial sale no bidder acquires any interest in the property for which he has bid, and upon the coming in of the return and report of the commissioner, referee or receiver, and after a hearing upon the same, the confirmation or disaffirmance of the sale is a matter which rests absolutely with the court, in the exercise of a sound judicial discretion. If it appears to the satisfaction of the court upon due proof that the price or sum bid is disproportionate to the value of the property offered for sale to such an extent that upon a re-sale a price or sum greater than the price or sum bid at the original sale—exclusive of the expenses of a new sale—can be obtained, it is the duty of the court to order a re-sale, and a failure on the part of the court to discharge its duty in this particular would, on appeal, constitute reversible error." (Tr. p. 49.)

In other words, he holds that it is a matter which rests in sound judicial discretion, but that the rule of law is that if more could be obtained on a re-sale than on the original sale exclusive of the amount bid, he was bound to set aside the sale.

How then have we had any opportunity to appeal to the discretion of the chancellor exercised under proper rules of law, or had our day in Court under these rules of law before the Supreme Court of Hawaii, which has simply affirmed the judgment as an exercise of discretion on the part of the Circuit Judge, although that discretion was exercised under the erroneous view of the law held by that Court?

The authority of the Circuit Judge must be exercised and governed by the principles of judicial discretion under the rules of law.

Ex Parte Farmers' Loan & Trust Co., 129 U. S. 206, 32 L. ed. 656.

Blossom v. The Milwaukee and Chicago R. Co., 1 Wall. (U. S.) 655: 17 L. 673.

Where property sold for $4700 testimony of an offer of $9805, held not sufficient to open sale, the court saying:

"The discretion to be used by the court in confirming sales of guardians must conform to established principles.

The English practice of opening biddings at such sales is not adopted in this state.

As a general principle, mere inadequacy of price is not a sufficient cause for setting aside a sale."

Ayers v. Baumgarten, 15 Ill. 444.

"The Chancellor has a broad, but not arbitrary, discretion in the matter of approving or disapproving a master's sale made subject to the Court's approval by the terms of the decree; but such discretion must be exercised according to rules of law.

The Court's action in approving or disapproving a master's sale may be assigned for error by the proper parties."

Quigley v. Breckenridge, ubi supra.

It is an erroneous exercise of such a discretion to set aside a sale because more can be realized on a re-sale.

Morrisse v. Inglis, ubi supra.

Bethleham Iron Co. v. Phil. & S. S. Co., ubi supra.

American Insurance Co. v. Oakley, 9 Paige (N. Y.) 259.

Pewabic Mining Co. v. Mason, ubi supra.

In a Georgia case already cited it was distinctly held that where the officer had sold the property as a whole for one-fifth what it would bring in lots, and the error was one simply of judgment, as in this case, the sale could not be set aside on that ground because five times as much could be secured on a re-sale.

Palmour v. Roper, ubi supra.

So in Pennsylvania, in an execution sale, which in that State as in some others is subject to confirmation by the Court, where it was admitted by the Court that the setting aside or refusing to set aside of a sheriff's sale is in the sound discretion of the Court below, and unless there be a manifest and gross abuse of that discretion that the Court would not disturb that decree.

"But it may be argued that there was a gross or manifest abuse of discretion here, because the learned judge of the common pleas sets out, as a reason for setting aside the sale, gross inadequacy of price, which the law has settled is not of itself a sufficient reason. If this were the only reason on which the decree rested, the argument of appellant would be sound. Clearly, it is an abuse of discretion when, to reach a decree, the court itself over-rides the established law."

Stroup v. Raymond, ubi supra.

"The purpose of the law is that the sale shall be final: and to insure reliance upon such sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matter which ought to have been attended to by the complaining party prior thereto. And in this respect regard may properly be had to all that has transpired before, for the conduct of the parties, their acts and commissions, may largely interpret their action at the time of the sale."

Pewabic Mining Co. v. Mason, ubi supra.

See also:

Moore v. Triplett, 96 Va. 663, 32 S. E. 50, 70 Am. St. Rep. 882.

The purchaser in this case is in no way responsible for the inadequate price. There has been no surprise or mistake caused by him, and many of the cases hold that something more must appear than the opportunity to get a higher price.

American Ins. Co. v. Oakley, ubi supra.

Woodhull v. Osborne, 2 Edw. Ch. (N. Y.) 614.

Barling v. Peters, ubi supra.
Quigley v. Breckinridge, ubi supra.
Johnson v. Dorsey, 7 Gill (Md.) 269.
Hays v. Steiger, 29 N. J. E. (2 Haw.) 196.
Young v. Teague, 1 Bailey Eq. (S. C. 1830).

We respectfully submit that the action of the Circuit Court, in setting aside the sale where there is no surprise or fraud alleged, and the only mistake which has been made has been in selling the property as a whole, in which, apparently, all parties except the purchaser concurred, where the purchaser has been entirely free from responsibility for the alleged low price, and particularly where the court set aside the sale under the erroneous view that it was his duty so to do if more could be realized on the re-sale, should be reversed.

Respectfully submitted,

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